

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

DRAFT 12/18

In the Matter of

Petition for Declaratory Ruling that AT&T's)	
Phone-to-Phone IP Telephony Services are Exempt)	WC Docket No. 02-361
from Access Charges)	

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Wireline Competition Bureau Public Notice issued November 18, 2002. The Commission seeks comments on AT&T Corporation's (AT&T) Petition for a declaratory ruling (Petition) regarding the application of access charges to Internet Protocol (IP) telephony services.¹ Specifically, AT&T seeks a Commission ruling that all Voice Over Internet Protocol (VOIP) services carried over the Internet be permanently exempt from access charges and that all other phone-to-phone IP and VOIP telephony services be exempt from access charges until the Commission determines otherwise.

In support of its request, AT&T contends that requiring VOIP services carried over the Internet to pay access charges would be "a tax on the Internet" and be contrary to Congressional intent that the Internet be "unfettered by Federal or state regulation."² Second, AT&T argues that applying access charges to "phone-to-phone" IP calls even on "private" interexchange networks would be contrary to past Commission policy of not applying such charges at least until such services have "matured."³ AT&T asserts that this policy is appropriate because IP telephony: (1) represents a small fraction of interexchange calling; (2) may evolve into something more than a mere substitute for traditional interexchange services; and (3) could be severely disadvantaged in

¹ Internet Protocol is simply one standard means, among several, of arranging information for transmission over a network. It is the standard used for transmissions over the public Internet and is also used over other, private networks.

² Petition p. 25.

³ Id., pp. 25-26.

competition with other IP-based services if forced to pay access charges. Further, the company argues that it would be difficult to apply access charges in a non-discriminatory manner to all VOIP services and that continuing the access charge exemption would “cause no cognizable harm to incumbents or to any objective of the [Telecommunications Act of 1996].”⁴

The Commission should reject AT&T’s request to the extent that it seeks to have the Commission reverse its tentative conclusion that “phone-to-phone” IP telephony services generally appear to be “telecommunications services,” not “information services.” Moreover, AT&T’s Petition raises the larger issue of whether disparate regulatory treatment of different call types is appropriate or sustainable in an increasingly competitive market. The NYDPS suggests that the Commission continue to move toward a regulatory framework that recognizes that all calls making comparable use of the local network should incur comparable charges for that use.

BACKGROUND

Originally, end users conducted VOIP communications between each other using their own computers and connections to their respective Internet Service Providers (ISP). When both users were “online,” software on their own computers could be used to convert analog voice signals to and from the Internet Protocol for transmission over the public Internet between their respective internet addresses. Such “computer-to-computer” IP telephony transmissions would be “transparent” to their ISPs and any underlying network provider (e.g., the Local Exchange Carrier, or LEC) because they would be indistinguishable from other, non-voice transmissions (e.g., exchanges of files or web pages).

Later, “computer-to-phone” and “phone-to-phone” VOIP communications became possible when third parties began offering gateway services. Such gateways form an interface between the public switched telephone network (PSTN) and the Internet (or private IP networks). The gateways perform protocol conversion to and from IP and provide signaling and addressing functions to direct the call to the desired PSTN address (i.e., the called party’s telephone number). The gateways typically are operated

⁴ See generally, Id. pp. 27 – 32.

by providers offering to complete telephone calls for a fee in competition with providers of traditional long distance telephone services. Users of these phone-to-phone IP telephony services, in their most advanced forms, would find them indistinguishable from traditional telephone calls. The user would pick up the phone, dial the desired telephone number using the normal dialing pattern, complete the communication, and be billed as with any normal long distance call. The user would not know that the transmission had at some point been converted to IP and, perhaps, routed over the Internet.

The Commission has not definitively determined the proper classification of any form of IP telephony, although it has allowed all VOIP calls to be treated as “information services,” rather than as “telecommunications services.”⁵ In its 1998 *Universal Service Report* to Congress the Commission observed that ISPs do not appear to be providing telecommunications when users of the ISPs’ services conduct “computer-to-computer” VOIP calls.⁶ In the same report, however, the Commission opined that “phone-to-phone” IP telephony services appear to lack “the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’”⁷ The Commission deferred definitive resolution of these issues pending development of a fuller record.

I. The Commission Should Adopt Its Tentative Conclusion that “Phone-to-Phone” IP Telephony is a Telecommunications Service

The AT&T Petition suggests that the use of internet protocol, or routing a call over “the Internet,” or perhaps simply associating the word “internet” with a service somehow takes it out of the realm of telecommunications and into a special world protected from regulation.⁸ However, the company makes no claim that the

⁵ The Commission has asserted jurisdiction over “enhanced” or “information services” and exempted such services from payment of interstate access charges, the so-called “ISP exemption.”

⁶ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), 13 FCC Rcd 11501, released April 10, 1998, para. 87 (Universal Service Report).

⁷ Id. at para. 89.

⁸ Petition, see generally pp. 24-25.

services for which it seeks the exemption generally are “information services.”⁹ Nor has the Commission reached such a conclusion. Indeed, as AT&T observes, the Commission has not reached a definitive conclusion about the definitional status of any form of VOIP. Contrary to the Petition’s assertion,¹⁰ the Commission did not find that “computer-to-computer” VOIP is not a telecommunications service. It concluded that ISPs over whose facilities such communications were being conducted were not offering telecommunications services, but it did not conclude the communications themselves were not telecommunications.¹¹

More specifically, the Commission found that the nature of the service being offered to customers determined its classification. If a user can receive nothing more than pure transmission, the service is a telecommunications service; if the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.¹² From a functional standpoint, the Commission found, users of phone-to-phone IP telephony services obtain only voice transmission, rather than information services, such as access to stored files.¹³ Consequently, it reasonably concluded that “phone-to-phone” IP telephony appears to bear the characteristics of a “telecommunications service.”

The New York State Public Service Commission (NYPSC) reached the same conclusion after reviewing a complaint filed by Frontier Telephone of Rochester that “phone-to-phone” IP telephony provided in New York by US Datanet Corporation was a telecommunications service. The NYPSC found:

⁹ AT&T does assert that some apparently small portion of its VOIP traffic consists of “enhanced services” -- prepaid calling card services that include advertising announcements. We offer no opinion as to whether such a service actually qualifies as an “enhanced service.” We would note, however, that even if it is, the underlying transmission service, even if IP-based, would still appear to be a “telecommunications service.”

¹⁰ Petition, p. 28.

¹¹ Universal Service Report, para. 87.

¹² Id., para. 59.

¹³ Id., para. 89.

- (a) DataNet holds itself out as providing voice telephony service.
- (b) It does not provide enhanced functionality to its customers, such as storing, processing or retrieving information.
- (c) Its customers are not required to use Customer Proprietary Equipment (CPE) different from the CPE used to place ordinary calls over the public switched telephone network.
- (d) Its customers place calls to telephone numbers assigned in accordance with the North American Numbering Plan.
- (e) Its use of Internet protocol is only incidental to its own private network and does not result in any net protocol conversion to the end user.
- (f) A substantial portion of its traffic uses no IP conversion at all and is handled by interexchange carriers (IXCs).
- (g) It uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the local exchange as do IXCs.

The NYPSC concluded:

that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers. Its service fits the definition of “telecommunications” contained in the 1996 Telecommunications Act and is not “information service” or “enhanced service.” Thus, its traffic is access traffic just like any other IXC’s traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges.¹⁴

In its Petition, AT&T criticizes this NYPSC decision, not for its conclusion that the IP telephony in question is a telecommunications service, but for its application of intrastate access charges to such calls when they both originate and terminate within the state. AT&T believes the Commission’s current policy of not assessing federal access

¹⁴ Case 01-C-1119, Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges, Order Requiring Payment of Intrastate Carrier Access Charges, issued May 31, 2002, pp. 8-9.

charges on interstate VOIP calls somehow dictates an identical result at the state level. To the contrary, having found that the communications in question were telecommunications services, the NYPSC properly applied state law and determined the appropriate charge to be applied for use of the local network facilities in completing intrastate telecommunications.

II. The Relief Requested by AT&T Would Enhance Opportunities for Arbitrage in the Use of the Local Network

The pattern of providers attempting to take advantage of different wholesale pricing for the same function has been evident as long as there have been competitors, and the attendant regulatory issues have become almost constant since passage of the Telecommunications Act of 1996. In response, regulators have been forced to reduce the incidence of such arbitrage, for example, by moving to more synchronous prices for unbundled network elements, reciprocal compensation, and access charges. The Commission should continue this progression, not by carving out services, such as IP telephony, for special treatment, but by moving toward common treatment of all similar uses of the local network

As AT&T's Petition correctly observes, all forms of "phone-to-phone" and "computer-to-phone" IP telephony "use identical local exchange facilities for the same purposes."¹⁵ They all use circuit switched local facilities to carry calls from a terminating gateway to the called party's location. So, too, do all manner of normal (non-IP) telecommunications, where the "gateway" is merely a carrier's switch or other point of interconnection. It matters not whether the calls are local or long distance, interstate or intrastate, voice or non-voice. Nor does it matter whether they are at some point converted to IP or some other protocol, whether they are eventually routed over "the Internet" or a switched circuit network, or whether they are carried on fiber or wire or radio waves. To the extent that various forms of telecommunications utilize the same local exchange facilities in a similar manner, efforts to make pricing distinctions among them would distort technological choices and market behaviors.

¹⁵ Petition, p. 30

Consequently, the Commission should not condone a regulatory scheme that treats similar uses of the local network differently. VOIP should not be treated differently than non-IP telephony.¹⁶

CONCLUSION

For the above reasons, the NYDPS urges the Commission to reject AT&T's request to the extent that it seeks to have the Commission reverse its tentative conclusion that "phone-to-phone" IP telephony services generally appear to be "telecommunications services." We further suggest the Commission continue to move toward a regulatory framework that recognizes that all calls making comparable use of the local network should incur comparable charges for that use.

Respectfully submitted,

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Dated: December 18, 2002

¹⁶ Given the CALLS and MAG access charge reduction schemes previously adopted by the Commission, it would seem that the price disparity with which AT&T is concerned has been greatly reduced. Nevertheless, it apparently still finds economic advantage in paying reciprocal compensation, rather than terminating access.